Office-Supreme Court, U.S.
FILED
MAR 11 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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In his Brief, Respondent Jerry Buckley Helm, hereinafter referred to as "Helm," makes a number of specific arguments in support of his claim that his sentence constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments to the United States Constitution. The State of South Dakota will respond to those contentions in the order in which they appear in Helm's Brief.

A. Helm says eligibility for parole cannot be equated with a possibility of commutation of sentence.

At pp. 18-20 of his Brief, Helm argues that parole, as an integral part of the penological system, is a right protected by due process of law, citing Morrissey v. Brewer, 408 U.S. 471, 477 (1972) and Wolff v. McDonnell, 418 U.S. 539 (1974), and not simply a unilateral hope like commutation of sentence.

However, in Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382, 403-404

(1980), Justice Powell, with whom Justices Brennan, Marshall, and Stevens joined, dissented as follows:

> Last Term in Greenholtz v. Nebraska Penal Inmates, 422 U.S. 1, 60 L.Ed.2d 688, 99 S.Ct. 2100 (1979), we held that a criminal conviction extinguishes whatever liberty interest a prisoner has in securing freedom before the end of his lawful sentence. The Court stated unequivocally that a convicted person has "no constitutional or inherent right . . . to be conditionally released before the expiration of a valid sentence." Id., at 7. Of course, a State may create legitimate expectations that are entitled to procedural protection under the Due Process Clause of the Fourteenth Amendment, but Texas has not chosen to create a cognizable interest in parole. The Court of Appeals for the Fifth Circuit has held that a Texas prisoner has no constitutionally enforceable interest in being freed before the expiration of his sentence. See Johnson v. Wells, 566 F.2d 1016, 1018 (1978); Craft v. Texas Board of Pardons and Paroles, 550 F.2d 1054, 1056 (1977).
>
> A holding that the possibility of parole discounts a prisoner's sentence for the purposes of the Eighth Amendment would be cruelly ironic. The combined effect of our holdings under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment would allow a State to defend an Eighth Amendment claim by contending that

> parole is probable even though the prisoner cannot enforce that expectation. Such an approach is inconsistent with the Eighth Amendment. The Court has never before failed to examine a prisoner's Eighth Amendment claim because of the speculation that he might be pardoned before the sentence was carried out.
>
> Recent events in Texas demonstrate that parole remains a matter of executive grace. In June 1979, the Governor of Texas refused to grant parole to 79% of the state prisoners whom the parole board recommended for release. The State's chief executive acted well within his rights in declining to follow the board, but his actions emphasize the speculative nature of the Court of Appeals' reasoning. As this case comes to us, petitioner has been deprived by operation of state law of his right to freedom from imprisonment for the rest of his life. We should judge the case accordingly. (Emphasis added.)

It is, therefore, the State of South Dakota's contention that parole in Texas is not constitutionally distinguishable from a commutation of sentence in South Dakota.

B. Helm says none of his felonies involved violence.

At p. 30 of his Brief, Helm says "[n]one of the prior felonies of Mr. Helm involved injury

to the person of another, threat of violence or the use of a weapon." Helm, therefore, concludes that his sentence is disproportionate.

However, in Rummel, this Court noted that "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." Hutto v. Davis, 30 Cr.L. 4159, at p. 4159 n. 2; Rummel v. Estelle, supra at p. 392. The State of South Dakota concludes that Helm's habitual offender status moots the violence issue.

C. Helm says his alcoholism caused him to run afoul of the law.

At p. 31 of his Brief, Helm argues that his alcoholism caused him to run afoul of the law (quoting, with approval, from the Eighth Circuit opinion) and concludes that his sentence is disproportionate.

The State of South Dakota rejects Helm's and the Eighth Circuit's analysis. Even if it were

true that Helm consumed alcohol near the time of each of his seven felonies, the State of South Dakota can find no showing in the record that alcohol "caused" Helm to steal. The Eighth Circuit's assertion that alcohol "caused" Helm to run afoul of the law is unsupported by logic or the evidence. In view of the facts that most alcoholics do not steal and many thieves do not drink, the State of South Dakota contends that Helm, like most other thieves, steals because he has less money than he wants and can obtain by legal means. The State of South Dakota, therefore, concludes that it is inconsistent with human experience to assume that Helm steals because he drinks.

The State further notes that the Eighth Circuit's analysis is contrary to SDCL § 22-5-5 reading as follows:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any

> particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act.

D. Helm says his last felony is entitled to more scrutiny than the preceding felony convictions.

At pp. 31-33 of his Brief, Helm argues, citing Wainstreet v. Bordenkircher, 276 S.E.2d 205, 212 (W.Va. 1981), that his last felony is entitled to more scrutiny than his preceding felony convictions because the last felony provides the ultimate nexus with the sentence. Helm concludes that his last felony was not very serious and, therefore, his sentence is disproportionate.

In response, the State of South Dakota would note the following language from Rummel v. Estelle, supra at p. 397:

> The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in

> the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.
>
> Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction. (Emphasis added.)

As to the seriousness of Helm's crime, it is noted that Helm's final conviction was for passing a check against a nonexistent account, not merely an insufficient funds check. It is, therefore, inconceivable that Helm "didn't realize he had done it" or that if Helm "had known about the check, he would have picked it up." Respondent's Brief at p. 32.

E. Helm says that a shorter sentence than life imprisonment would adequately serve penal goals.

Beginning at p. 39 of his Brief, Helm argues that a shorter sentence in his case would better serve penal goals and that, as a result, his sentence is disproportionate.

However, this Court, in Hutto v. Davis, supra at p. 4159 n. 2, analyzed the second factor in Hart v. Coiner, 483 F.2d 136 (CA 4), cert. denied, 415 U.S. 938 (1974), and concluded as follows:

> Hart's second factor calls for an examination of the purposes behind the criminal statute and the existence of less restrictive means of effectuating those purposes. On this factor the District Court was inconclusive, but noted that the amount of marijuana involved was less than nine ounces, implying that such minimal possession could adequately be deterred with shorter prison sentences. 432 F.Supp. at 452. Such analysis was implicitly rejected by our conclusion in Rummel that the "'small' amount of money taken" was inapposite, because to acknowledge that the state could have given Rummel a life sentence for stealing some amount of money, "is virtually to concede that the lines to be drawn are indeed 'subjective,' and therefore property within the province of legislatures, not courts." 445 U.S. 275-276.

F. Finally, the State of South Dakota contends that this Court ought not abandon its traditional deference to the legislative judgment.

In Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 432-433, 92 S.Ct. 2726 (1972), Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, stated:

> The Court's quiescence in this area can be attributed to the fact that in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.
>
> . . .
>
> Accordingly, punishments such as branding and the cutting off of ears, which were commonplace at the time of the Constitution, passed from the penal scene without judicial intervention because they became basically offensive to the people and the legislature responded to this sentiment.

The State of South Dakota respectfully requests that this Court defer to the good judgment and compassionate hearts of the citizens of South Dakota as determined by their legislative representatives.

CONCLUSION

Based on the foregoing arguments and authorities, and on the arguments and authorities presented in its initial brief, the State of South Dakota respectfully requests that this Court reverse the decision of the Eighth Circuit Court of Appeals and find that Helm's sentence does not violate the United States Constitution.

Respectfully submitted,

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